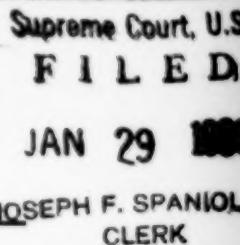


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No. _____



In The
Supreme Court of the United States
OCTOBER TERM, 1989

OKLAHOMA TAX COMMISSION, PETITIONER

v.

THE CITIZEN BAND POTAWATOMI INDIAN
TRIBE OF OKLAHOMA, RESPONDENT

**PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Whether an Indian tribe may operate a business, open to the general public, selling cigarettes and other items without complying with any applicable State tax law by virtue of the Sovereign Immunity Doctrine.
2. Whether the State may enforce compliance of State tax laws against a tribally-owned business by way of assessment for delinquent taxes against the Indian tribe or by a lawsuit to enjoin the tribal business activity until taxes are properly paid.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Oklahoma Tax Commission, and the respondent, Citizen Band Potawatomi Indian Tribe of Oklahoma. Cindy Rambo, Chairman of the Tax Commission; Robert L. Wadley, Vice-Chairman of the Tax Commission; and Don Kilpatrick, Secretary of the Tax Commission, were named in the proceedings below as defendants-appellees/cross appellants in their official capacities as members of the Oklahoma Tax Commission, petitioner herein.

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**THE CITIZEN BAND POTAWATOMI INDIAN
TRIBE OF OKLAHOMA, RESPONDENT**

***PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT***

Petitioner, Oklahoma Tax Commission, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 3, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 888 F.2d 1303, and is reprinted in the Appendix hereto, page A-1, *infra*.

The Judgment of the United States District Court for the Western District of Oklahoma (West, D.J.) has not been reported. It is reprinted in the Appendix hereto, page A-9, *infra*. The Order of the District

Court is not reported and is reprinted in the Appendix at page A-12, *infra*.

JURISDICTION

The opinion of the Court of Appeals for the Tenth Circuit was entered on November 3, 1989. No petition for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title 28 United States Code §1254(1) is set forth in the Appendix at page A-26. The Federal jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the Plaintiff below is a federally recognized Indian Tribe. Title 28 U.S.C. §1362 is set forth in the Appendix at page A-25.

STATEMENT OF THE CASE

1. NATURE OF THE CONTROVERSY

The Citizen Band Potawatomi Indian Tribe of Oklahoma (Tribe hereafter), a federally recognized Indian Tribe, owns and operates a convenience store which is open to the general public and from which the Tribe sells large quantities of cigarettes and other convenience store items. The tribal store is located on a tract of land within Pottawatomie County in Shawnee, Oklahoma which is held by the United States in trust for the Tribe. The Tribe had acquired the land, containing approximately 280 acres, from the United States in fee, unrestricted as to Indian ownership and taxable under the Act of September 13, 1960, 74 Stat. 903, and the Act of August 11, 1964, 78 Stat. 392. Subsequently, on May 27, 1976, the Tribe conveyed the land to "the United States of America in trust for the Citizen Band of Potawatomi Indians of Oklahoma" pursuant to the Act of January 2, 1975, 88 Stat. 1922.

Oklahoma law requires all vendors of tangible personal property, including cigarettes, to collect and remit state and local sales taxes (4% State plus 2% or 3% local) to the Oklahoma Tax Commission (State hereafter), 68 O.S. §1361. In addition, cigarette excise taxes are imposed on the consumer of cigarettes at the rate of \$2.30 per carton of 10 packages containing 20 cigarettes each, 68 O.S. §§302, 302-1, 302-2, 302-3, 302-4. Payment of the cigarette excise tax is evidenced by stamps purchased by the vendor from the State and affixed to each package of cigarettes sold. If a vendor sells cigarettes without affixing the excise tax stamp, the vendor will be liable to pay the State a sum equal to twice the amount of the tax due, 68 O.S. §305(c). If any vendor fails to comply with the State's Cigarette Stamp Tax Act or the Oklahoma Sales Tax Code, the Tax Commission shall determine the correct amount of tax due and issue an assessment for those taxes to the vendor by letter pursuant to 68 O.S. §221, and thereafter commence collection procedures. If a vendor continues to operate a business without paying the taxes imposed by State law, the State may institute any action necessary to enjoin such vendor from operating that business within Oklahoma, 68 O.S. §232.

The Tribe has sold and continues to sell, cigarettes and other taxable items from its place of business within the State of Oklahoma to the general public without regard as to whether its customers were tribal members or not. The Tribe does not collect the applicable State taxes on any of its sales and does not comply with the Cigarette Stamp Tax Act or the Oklahoma Sales Tax Code in any respect. Based upon the Tribe's business activity, the State issued an assessment letter to the Tribe on March 4, 1987, in the amount of \$2,691,470.70 for the sale and distribution of unstamped cigarettes, reprinted at page A-23.

2. THE PROCEEDINGS BELOW

After the State issued the assessment letter, the Tribe brought an action against the State in the United States District Court for the Western District of Oklahoma to enjoin the State from enforcing any State tax law against the tribal business and from assessing the Tribe for delinquent cigarette taxes. The jurisdiction of the District Court

was invoked under 28 U.S.C. §1362 because the plaintiff is a federally recognized Indian tribe.

The State answered and brought a counterclaim pursuant to Rule 13 (a) and Rule 18 (a) of the Federal Rules of Civil Procedure seeking declaratory and injunctive relief, declaring that State tax laws do apply to the tribal business and may be enforced against the Tribe and enjoining the Tribe from operating its business until it fully complies with State tax laws.

The District Court entered its judgment (page A-9) in this case May 6, 1988 in accordance with its Order of April 15, 1988 (page A-12). The District Court found that it had jurisdiction of both the complaint and the counterclaim and ordered that the Tribe is immune from the application of State tax laws and therefore the State is enjoined from enforcing its tax laws against the Tribe, and from assessing the Tribe for delinquent taxes or collecting taxes from the Tribe. However, the District Court found that the land upon which the store was located was an Indian reservation under 18 U.S.C. §1151 and therefore, sales to tribal members were exempt from State taxation but sales to non-tribal members were subject to State taxes and the Tribe must aid the state in collecting these taxes under the authority of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). Both litigants appealed this decision.

On Appeal, the Tenth Circuit first held that (1) the Tribe enjoyed sovereign immunity from unconsented suit, citing *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 (1977); (2) Rule 13(a) of the Federal Rules of Civil Procedure did not waive the Tribe's immunity; and (3) the District Court lacked jurisdiction to adjudicate the counterclaim. The Court therefore reversed the trial court's denial of the Tribe's motion to dismiss the State's counterclaims and directed the lower court to dismiss all counterclaims against the Tribe.

The Appeals Court then found that the land where the tribal store is located was an Indian reservation and thus, "because the conven-

ience store is located on land over which the Potawatomis retain sovereign powers, Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress." The Appeals Court found that no such jurisdiction exists and rejected the State's citation of authority to this Court's opinions in *Moe* and *Colville* for the State's proposition that the Tribe must collect the State's taxes. The Court ruled that the Tribe was not amenable to any State law under the doctrine of sovereign immunity and imposed a broad injunction upon the State from assessing or collecting taxes from the Tribe or enforcing any tax law against the Tribe and its business.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has rendered a decision which is in conflict with applicable decisions of this Court by enjoining the State from enforcing its tax laws or collecting its taxes against the Tribe. The Tenth Circuit has fabricated a theory of absolute and unqualified sovereignty for the Tribe to which the State is subjugated, and for the purpose of clothing the Tribe with the power to sue, and not be sued; the power to make law, and be subject to no law; and the power to exercise unknown rights, while ignoring the existing rights of others. In that the Appellate Court's opinion is a misconceived product of the personal emotions or political reactions of its individual members, it may be forgiven, but cannot be condoned in light of the contrary opinions of this Court which hold that tribal sovereignty is much more limited.

The lower court's opinion should not only be reviewed for its error, but also because of its far reaching and debilitating effect on the administration of State government and law, and its trenchant effect on the business community which must compete in the marketplace against a competitor who is unburdened by the expense of State regulation. Because of the importance of this case to State government, and because the Tenth Circuit has decided a federal question in conflict with applicable decisions of this Court, review by this Court is urgently required.

I. THE TENTH CIRCUIT'S OPINION WHICH LIBERATES THE TRIBALLY-OWNED BUSINESS FROM ANY RESPONSIBILITY TOWARD STATE LAW IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND OF THE OKLAHOMA SUPREME COURT.

The foremost judgment in the Tenth Circuit's opinion of this case is the express rejection of the controlling authority of this Court in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). The *Colville* case is directly on point with the case at bar. The Indian tribes in *Colville* were selling cigarettes to the public at large within the State of Washington without collecting the State's taxes and were thereby able to sell their cigarettes at deep discounts, compared to the price of taxed cigarettes, which afforded the tribal stores an artificial competitive advantage over all other businesses in the State which, in turn, translated into abnormally large sales of cigarettes for the tribes. This Court found that since the tribal smokeshops were located on the Colville Indian Reservation, the tribes could sell products to the reservation tribal members free of state taxation, however, all sales by the tribes to non-tribal members were fully taxable by the State, which taxes must be collected by the vendor from the consumer and properly remitted to the state pursuant to state law.

The only difference between the present case and *Colville* is that the Potawatomi Tribe does not inhabit a federal Indian reservation as the tribes in *Colville* did. In fact, there are no federal Indian reservations within the State of Oklahoma, nor have there ever been any such reservations since Oklahoma statehood in 1907. Rather, the tribal store in the present case is located on Indian Trust land, that is, land held in trust by the United States for the benefit of the tribe under 25 U.S.C. §501.

This distinction is important because this Court has held that tribal activities conducted outside the reservation present different considerations. State authority over Indians is yet more extensive over activities not on any reservation. Absent express federal law to the contrary, Indians going beyond reservation boundaries have gen-

erally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. This holding was rendered by this Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). In the *Mescalero* case, this Court found that New Mexico's gross receipts tax was properly enforced against the Tribe's ski resort which was located on the Tribe's trust land outside of the Tribe's reservation boundaries and the Tribe was therefore liable to pay state taxes on its gross receipts in the amount of \$26,086.47. The *Kake* decision dealt with the State of Alaska's enforcement of the state anti-fish trap law against the Indian tribe in violation of the state law. This Court found that the fish traps were not operated on an Indian reservation and therefore the state could properly enforce its law against the tribe by seizing the tribe's fish traps and arresting the individuals who were operating them.

In contrast to an off-reservation situation, activities by reservation Indians on the reservation are treated differently. In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), this Court ruled that the State of Arizona could not tax the income of a Navajo Indian who resided and earned her income exclusively within the Navajo Reservation in that State because such taxation would infringe on the right of reservation Indians to govern themselves. But what is most significant about the *McClanahan* case is what the case does not involve. At 411 U.S. 167-168 this Court stated:

We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government...Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations...Nor finally is this a case where the State seeks to reach activity undertaken by reservation Indians on nonreservation lands. (Citations omitted).

This Court concluded at 411 U.S. 181; "This Court has therefore held that 'the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws

and be ruled by them'," (the Court's emphasis). The Court ruled three years later in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), that state taxation of cigarette sales by an Indian tribe on the reservation to non-Indians does not violate this right and reiterated that decision with emphasis in *Colville*. All of these cases illustrate that sales of cigarettes by a tribe either on or off of a reservation are taxable by the state.

The Tenth Circuit's opinion is in conflict with all of the opinions of this Court cited above. In Section II of the Tenth Circuit opinion, the Court permanently enjoined the Tax Commission from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against the Tribe. The Tenth Circuit plainly ruled contra to *Colville* that the tribe's sales of cigarettes to the general public are immune from state taxation. There is no authority for this opinion.

The Tenth Circuit analyzed this case by first finding that the tribal store is located within an Indian Reservation by holding at page A-5 that, "Lands held in trust by the United States for the Tribes are Indian Country within the meaning of Section 1151(a)," citing *Cheyenne-Arapaho Tribe v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980), (18 U.S.C. §1151(a) defines Indian Country as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation"). This holding is plain error in light of the reality that federal Indian reservations are either created by Congressional enactments or executive orders of the President, but never by judicial decree. In this case the Tenth Circuit never cited an Act of Congress or executive order to sustain its holding. Certainly the statutes which authorize land to be transferred to the United States in trust for a tribe, 25 U.S.C. §§465, 501, do not provide for any reservation status for such land. In the *Mescalero* case, this Court declined to treat such trust land as having reservation status and ruled at 411 U.S. 155, 156 that "On its face, the statute exempts land and rights in land, not income derived from its use," and, "Absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax

simply because the land from which it is derived, or its other source, is itself exempt from tax." See footnote 11 at 411 U.S. 155. The Tenth Circuit dismissed the authority of *Mescalero* as distinguishable, see page A-6.

After finding that the land was "Indian Country," the Tenth Circuit concluded, at page A-7, that, "Because the convenience store is located in Indian Country, the Potawatomis possess sovereign powers with respect to the land and the store." Therefore, the Appeals Court found that Oklahoma has no authority to tax the store's transactions under the theory of sovereign immunity. However, the Tenth Circuit was obliged to overcome one last hurdle to reach its central finding, that hurdle being the controlling precedent of the *Colville* case which ruled that the tribal business was responsible for state taxes.

The Tenth Circuit avoided the result in *Colville* by reasoning that in *Colville* the Indian tribe had opted to come under state jurisdiction pursuant to Pub.L.No. 83-280. (This law is commonly referred to as PL 280 and is codified at 28 U.S.C. §1360 and 25 U.S.C. §1322 for civil jurisdiction and 18 U.S.C. §1162 and 25 U.S.C. §1321 for criminal jurisdiction.) The case at bar differs from *Colville*, thought the appeals Court, in that Oklahoma disclaimed jurisdiction over Indian lands upon entering the Union, did not assert jurisdiction under PL 280, and, not surprisingly, there is no voluntary grant of jurisdiction by the Tribe. The State submits that the Tenth Circuit's reasoning is faulty, first because this Court never relied on PL 280 for its holding in *Colville*, nor even mentioned the law, rather the *Colville* opinion was based on this Court's reasoning that the State's taxation of its own citizens on transactions occurring within a federal reservation did not infringe on the Tribe's right to self-government and was not federally pre-empted. Secondly, Oklahoma's disclaimer clause and PL 280 do not spell tax immunity for Indians in Oklahoma.

The Oklahoma Enabling Act, 34 Stat. 267 at Section 3, required the disclaimer provision to be placed in the Oklahoma Constitution. The Constitution provides at Art. I §3 that the State disclaims all right and title to all lands within the State held by any Indian, Tribe, or

nation. Such disclaimer language was construed by this Court in *Organized Village of Kake* at 369 U.S. 67-69, which states that a disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interests. The Court stated that the test of whether a state law could be applied on Indian reservations was whether the application of that law would interfere with reservation self-government. The Congressional intent and understanding of the disclaimer language was expressed in Senate Hearing reports and is stated at 369 U.S. 69, as follows:

The State may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of people on those lands, as long as that does not affect the title to the land.

The Oklahoma Supreme Court has likewise construed the disclaimer in Okla. Const. Art. I, §3 as a disclaimer of proprietary rather than governmental interests in *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 87. Contrary to the Tenth Circuit's ruling below, the disclaimer language does not free the Tribe from responsibility toward State laws.

Next, PL 280 is not a bar to State jurisdiction and has no application to the State of Oklahoma. This Court has ruled in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1980), that Congress' primary concern in enacting PL 280 was combatting lawlessness on reservations. This specific problem was solved in Oklahoma by the Dawes Commission when all reservations were disestablished prior to Statehood with a view to the ultimate creation of a state for the Union. The history of the Dawes Commission is related in the case of *Woodward v. DeGraffenreid*, 238 U.S. 284 (1915), which details the disestablishment of the reservation system to create the State of Oklahoma.

At any rate, PL 280 is not a license for the Tribe to make untaxed goods and services available to the citizens of Oklahoma in violation of State and Federal law. It should be pointed out that not only does the *Colville* decision require the Tribe to sell State tax paid cigarettes,

but also the Trafficking in Contraband Cigarettes Act, 18 U.S.C. §2341 et seq. makes it unlawful for any person to possess, sell or distribute contraband cigarettes, i.e. cigarettes which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found. This law does not exempt Indians or Indian Tribes from the proscribed conduct. Furthermore since PL 280 was intended to facilitate, not impede, a state's jurisdiction, it is inconsistent with that intent for the Tenth Circuit to use the statute to bar the State's right to collect its valid taxes.

The lower Court's opinion barring the State's attempt to enforce its taxes by assessment or counterclaim against the Tribe also brings the Tenth Circuit into conflict with the Supreme Court of Oklahoma's opinion in *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okl. 1985).

In the *Seneca-Cayuga* opinion, the State Supreme Court ruled that sovereignty is not a bar to state jurisdiction, although states must meet the modern tests for measuring infringement upon tribal self-government and federal pre-emption. Since the Tenth Circuit has made the broad ruling that tribal sovereignty is a bar to state jurisdiction for any purpose, the Tax Commission is faced with attempting to administer state laws in light of two controlling but diametrically opposed Appellate Court opinions. Because the Tenth Circuit has rendered an opinion on an important question of federal law in conflict with a state court of last resort and in conflict with applicable decisions of this Court, the State requests this Court to review the decision of the Tenth Circuit.

II. THE DECISION BELOW ERRONEOUSLY APPLIED THE DOCTRINE OF SOVEREIGN IMMUNITY TO DISPOSSESS THE STATE'S POWER TO TAX ITS CITIZENS, WHICH RAISES IMPORTANT PROBLEMS THAT UNDULY BURDEN THE ADMINISTRATION OF STATE LAW.

The Tenth Circuit ruled in Section I of its opinion, at page A-3, that Indian tribes enjoy sovereign immunity from suits to which they

do not consent and therefore the State could not bring a counterclaim against the Tribe under the authority of *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977). The result being that even though the State does have the right to have its valid taxes collected, the State cannot enforce its right against the Tribe under the Tenth Circuit's sovereign immunity theory.

In its basic form, this case involves the struggle of the lower courts and the litigants to find the outer limits of tribal sovereignty and its place within the federal system. The Tenth Circuit's opinion recognizes that the Tribe maintains unqualified sovereignty over the State which is co-extensive with that of the United States. The State suggests that the Tribe's sovereignty is not of the same dignity as that of the United States but is rather limited to the tribal courts, concerning matters within the scope of the Tribe's internal and social relations.

In *United States v. United States Fidelity and Guarantee Co.*, this Court ruled:

The public policy which exempted the defendant as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.

The *U.S.F. & G.* case offers a straightforward approach to the sovereignty doctrine. However, in light of more recent opinions, the case at bar is an appropriate case to re-examine the merit of that doctrine. Furthermore, the doctrine was applied to circumstances in the *U.S.F. & G.* case which are different than the circumstances presented today. Therefore, the *U.S.F. & G.* case does not resolve the problems facing the State and the Tribe ~~today~~ because it is a maxim not to be disregarded that general expressions, in every opinion, are

to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated, *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821).

The *U.S.F. & G.* case involved the litigation of coal mining contracts entered by the United States in its governmental capacity on behalf of the Indian Tribes. The United States, as trustee, on its own behalf, and on behalf of the Indian Tribes, brought the lawsuit to seek payment on a bond put up by the mining companies to insure royalty payments. The United States had an interest in collecting the bond due to its statutory duty to conserve and manage the Tribe's mineral resources as the trustee of those resources. This Court, therefore, would not allow an end run around the sovereignty of the United States by an attack, through the defendant's crossclaim, against the tribal wards which would deplete those federally protected tribal resources. Since the Federal Government's interest was being litigated and the United States was suing in its own name to protect that interest, the immunity of the United States attached to the tribal beneficiaries. *U.S.F. & G.* is therefore more illustrative of the sovereignty of the Federal Government rather than of the tribal government.

In the case at bar, the United States is not a party and no federally protected rights are involved or are being infringed. The Federal Government takes no responsibility for the actions of the Tribe or the operation of the tribal business. The United States only holds the subject tract of land for the Tribe in trust, but title to the land is not in question. The Federal Government has no interest in the tribal business and has no duty to manage the affairs of the enterprise. Yet the Tenth Circuit seizes upon the language in *U.S.F. & G.* to rule that an Indian Tribe may operate businesses in Oklahoma without regard to State law and make untaxed goods and services available to Oklahoma citizens.

It must be conceded that this Tribe may maintain its own self-government over its internal relations which will never be disturbed by a state law. But the Tribe cannot be allowed to destroy the integrity of the State tax system by wholesale evasion of State taxes and thereby disturb the internal relations of State government. Although this Court has ruled that the Tribe is subordinate to only the Federal Government, not the States, likewise, the States are subordinate to only the Federal Government, and not the Tribe.

It is axiomatic that taxes are indispensable to the support of State Government because the State does not operate convenience stores, smokeshops or bingo halls to raise revenue. The State of Oklahoma pays for government through taxation of its citizens. Under the Tenth Circuit's Order, the Tribe will be able to operate any business itself or to enter into management agreements, leases, licenses or permits with anyone to operate the tribal business on its behalf without collecting taxes. The Tenth Circuit's Order has thus placed whole areas of state taxation beyond the reach of State jurisdiction, thereby restructuring Oklahoma's taxing system by decree.

Although the Tribe has the right to govern itself without state interference, that right does not allow the Tribe to rearrange state laws to fit its own purposes to the detriment of the citizens of the State of Oklahoma. The Tribe may operate free from state control within its own sphere, but outside of that sphere of internal jurisdiction, when the Tribe enters the general business community, the tribal enterprise steps into the reach of state law. The Tribe may avoid that reach by not operating a business within Oklahoma, but it may not avoid that reach by way of absolute sovereignty because this Tribe does not possess absolute sovereignty. When a Tribe enters the economic community of this State to operate a business in competition with all other businesses, it must abide by the state laws that govern commercial activity which impose the duties and responsibilities which all businesses owe to their communities.

In this regard as a matter of public policy, when a Tribe operates a business and uses the protections, facilities, and work force of the state in order to make money from the custom of the local community,

the Tribe should be responsible for the liability that it accrues because business has always been required to pay its own way. When the Tribe enters the State to conduct a business, there is no authority that entitles the Tribe to stand differently from any other businessman. It avails itself of the machinery furnished by the State and it should contribute in the same proportion that every other businessman contributes for the privileges that it uses. It has no better or other right to use them than anyone else. "The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor or coal," Justice Holmes dissent in *Panhandle Oil Co. v. State of Mississippi*, 277 U.S. 218, 224 (1928).

In this case, the State's interests lie in collecting a tax from its citizens as prescribed by the State Legislature. The tribal interests lie in the economic development of its business for the profit of the Tribe. The State would submit that requiring the Tribe to comply with State tax laws will fulfill the State's interests and will not prevent the Tribe from sustaining its economic development just as it does not prevent all other businesses from realizing a profit.

For these reasons, the viability of the Tribe's absolute sovereign immunity theory has been tested in recent cases and this Court has abrogated the doctrine of sovereign immunity for Indian tribe's in the area of state taxation in order to accommodate the legitimate and compelling interests of the State to collect its valid taxes. The sovereignty doctrine, as a bar to state jurisdiction has been replaced with a reliance on federal pre-emption or infringement of self-government.

This is not to say that an Indian tribe has no sovereignty as a government, rather, the sovereignty of a tribe is limited to its internal relations and does not reach so far as to dispossess a state's ability to tax its own citizens. This limited sovereignty is difficult to characterize because it is a function of, or is dependent on, the Federal Government's relationship to the tribe. Therefore a tribe is really not sovereign at all, which makes a traditional application of the doctrine impossible.

The sovereign status of an Indian tribe was described by this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) at 55:

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government...Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations" ... They have power to make their own substantive law in internal matters...and to enforce that law in their own forums. (Citations omitted).

In *Martinez*, this Court held that a tribal member could not sue her tribe in federal court for civil rights violations stemming from the tribe's denial of membership to her children. This Court also upheld tribal sovereign immunity in *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 (1977), wherein the State of Washington was barred from regulating salmon fishing by Puyallup tribal members on the Puyallup Reservation. These two cases precisely make the point. The *Martinez* and *Puyallup* decisions uphold tribal sovereignty in matters involving *internal tribal affairs and self-government or on-reservation activity of the tribe and its members*. These decisions do not provide that an Indian tribe enjoys absolute and unqualified sovereignty over the government of the State of Oklahoma. A tribe may enjoy sovereign immunity in its own courts, but it does not enjoy sovereign immunity in this Court.

As explained by this Court in *Nevada v. Hall*, 440 U.S. 410 (1979), the doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the Courts of another sovereign. As stated by Justice Holmes, sovereign immunity is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." This Court found that this explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and

authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

As stated, this Court has abrogated the doctrine of sovereign immunity for tribes in cases involving state action which do not infringe tribal self-government. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), state inheritance taxes were held applicable to estates of Indian tribal members that did not live on reservations. The cases of *Ward v. Race Horse*, 163 U.S. 631 (1896) and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) hold that a State may regulate hunting and fishing of the tribe or its members off of an Indian reservation. The companion cases of *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), hold that Indians living and earning their income exclusively on an Indian reservation are not subject to state taxation, however, Indians and Indian tribes who undertake activities on nonreservation land are subject to state taxation and the full extent of state law applicable to those activities. Finally, activity by non-Indians on an Indian reservation is subject to state laws, *Thomas v. Gay*, 169 U.S. 264 (1898), and tribally owned businesses on the reservation which trade with non-tribal members are responsible for state taxes applicable to those transactions, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), *Rice v. Rehner*, 463 U.S. 713 (1983).

These cases illustrate the limits of the so-called "Indian sovereignty doctrine." Under the doctrine a tribe may not be sued concerning internal matters of tribal government or for on-reservation activity. The present case contains neither of these conditions which would afford immunity to the tribe. There is no authority to allow a tribe to operate a business within this State and without complying with state law. An Indian tribe enjoys no immunity from state laws, rather, the claimed immunity is only a function of the Federal Government's authority over federal lands such as Indian reservations. Therefore, the case does not turn on whether state laws may be

applied against an Indian tribe because clearly, they can be so applied. The case turns on whether federal law has pre-empted state law or whether state action has infringed tribal self-government.

Although the Tax Commission is concerned in this lawsuit with the administration of the State's tax laws, the effect of absolute sovereignty of a tribal business is even more far reaching than the State's interest in taxation. The State is also interested in the protection of the life and property rights of its citizens. If the State cannot sue the Tribe for taxes, it would follow that the Tribe would not be responsible to the State workers compensation or unemployment compensation laws. And neither would the Tribe be answerable for damage that it might cause to patrons of the tribal business or to other businesses with which it deals. The State simply suggests that the Tribe may operate its government in any way that it sees fit, however, if the Tribe operates a business in this State, it must obey applicable state laws.

The Tenth Circuit's Opinion is based entirely on the theory that an Indian tribe maintains absolute and unqualified sovereign immunity from suit, to the end that the Tribe in this case may operate a business in violation of state laws. The Tenth Circuit has no authority for this holding and has decided an important question of federal law in such a way that adversely affects the State's ability to tax its citizens, which decision is in conflict with applicable decisions of this Court.

CONCLUSION

Because the Tenth Circuit Court of Appeals has decided an important question of federal law in conflict with decisions of the highest Court of the State of Oklahoma and in conflict with applicable decisions of this Court, review by this Court is urgently required. For these reasons, a writ of certiorari should issue to review the Order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,
OKLAHOMA TAX COMMISSION
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ATTORNEYS FOR PETITIONER

APPENDIX A

PUBLISH

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Plaintiff-Appellant/
Cross-Appellee, v. THE OKLAHOMA TAX COMMISSION; CINDY RAMBO, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice Chairman of the Tax Commission; and DON KILPATRICK, Secretary of the Tax Commission, Defendants-Appellees/
Cross-Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-87-0338-W)**

Michael Minnis (David McCullough with him on the briefs) of Michael Minnis & Associates, P.C., Oklahoma City, Oklahoma, for Plaintiff-Appellant/Cross-Appellee.

David Allen Miley, Assistant General Counsel, Oklahoma Tax Commission, Oklahoma City, Oklahoma, for Defendant-Appellee/Cross-Appellant.

Before McKAY, BARRETT, and SEYMOUR, Circuit Judges.

McKAY, Circuit Judge.

This case revolves around an attempt by Oklahoma to tax cigarettes sold by the Citizen Band Potawatomi Indian Tribe of Oklahoma (the "Potawatomis" or the "Tribe") in a convenience store which the Tribe wholly owns and operates. The store was constructed with federal funds and located on land held in trust by the federal government which is "exempt from State and local taxation." 25 U.S.C.A. §465. In February of 1987 the Oklahoma Tax Commission sought to collect state cigarette taxes from the Indian tribes and their licensees. In moving against the Potawatomis, Oklahoma served a \$2.7 million assessment letter on the Potawatomis' Business Committee Chairman, who would be personally liable if Oklahoma prevailed. The Potawatomis immediately sought an injunction in the district court of Oklahoma to prevent this. Oklahoma then revoked the assessment against the Chairman and proceeded against the Tribe itself.

The trial court granted the Potawatomis a preliminary injunction and enjoined Oklahoma from enforcing the cigarette tax against the Tribe, pending this suit. Oklahoma asserted a counterclaim asking the trial court to: (1) assume jurisdiction over all matters; (2) issue declaratory relief setting forth the rights and jurisdiction of the parties; (3) declare that Oklahoma had jurisdiction to tax the Potawatomis' sales; (4) declare that Oklahoma may enforce its tax laws against the Potawatomis by way of assessments and injunctions; and (5) enjoin the Potawatomis from selling cigarettes on which no state excise or sales taxes are collected or remitted.

In response, the Potawatomis moved to dismiss Oklahoma's counterclaim, arguing that the trial court lacked subject matter jurisdiction over the claims raised in the counterclaim. The Potawatomis argued further that the court lacked jurisdiction over the Tribe because the Tribe enjoys sovereign immunity and cannot be sued unless the Tribe consents. The trial court denied the Potawatomis' motion to dismiss on the ground that the counterclaim was a compulsory counterclaim under Fed. R. Civ. P. 13(a) and that it "needs no independent jurisdictional basis." Moreover, the court held that the Potawatomis had waived their sovereign immunity noting that the "relief sought by the defendants [Oklahoma] is so intertwined with the relief sought by the plaintiff [Potawatomis] that the counterclaim falls

within the scope of waiver contained in the plaintiff's complaint." Document No. 32, Order, filed May 29, 1987, at 3-4.

The Potawatomis filed a motion for a new trial, contending that Fed. R. Civ. P. 13(a) was not a congressional waiver of the Potawatomis' sovereign immunity. The trial court denied the Tribe's motion, and they appeal both the denial of their motion to dismiss and their motion for a new trial. The Potawatomis also claim error in the trial court's ruling that sales of cigarettes to nontribal members may be taxed. Oklahoma cross-appeals claiming that the court erred in holding that the Tribe and its members who purchase cigarettes are tax exempt.

Here, the district court's denial of the Potawatomis' motions to dismiss and for a new trial present primarily questions of law. As an appellate court, therefore, we review *de novo* the district court's rulings on those motions. See, e.g., *Morgan v. city of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986); *In Re Tri-State Equipment, Inc.*, 792 F.2d 967 (10th Cir. 1986); *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986).

I. Tribe's Motion to Dismiss Counterclaim

Indian tribes have sovereign immunity from suits to which they do not consent, subject to the plenary control of Congress. See *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512 (1940); *Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165, 172-73 (1977). The Supreme Court has held that an Indian tribe does not consent to suit on a counterclaim merely by filing as a plaintiff. See *Fidelity and Guaranty Co.*, 309 U.S. at 513. "Although the precise limits of this tribal immunity are not clear, . . . it is generally coextensive with that of the United States." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982).

In *Chemeheuevi Indian Tribe v. California Bd. of Equalization*, 757 F.2d 1047 (9th Cir.), rev'd on other grounds, 474 U.S. 9 (1985), the Ninth Circuit held:

[T]he compulsory counterclaim requirement of Rule 13(a) of the Federal Rules of Civil Procedure cannot be viewed as a congressional waiver of the Tribe's immunity. . .

. . . Rule 13(a) is explicitly intended to require joinder of only those claims that might otherwise be brought separately. The authorizing statute for the Federal Rules of Civil Procedure specifies that the rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072 (1982). We cannot find that a rule promulgated pursuant to this statute was intended impermissibly to abridge the Indian tribes' substantive right to immunity from suit. Nor can we read Rule 13(a) in isolation and extend federal jurisdiction despite the repeated specification that the rules are not intended to have such an effect.

Chemeheuevi Indian Tribe, 757 F.2d at 1053.

Relying on *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982), the trial court believed it also had jurisdiction based on the principle of "recoupment." Recoupment, however, is an equitable defense that applies only to suits for money damages. "[R]ecoupment is purely defensive and not offensive . . . [and applies] only to the abatement, reduction, or mitigation of the *damages* claimed by plaintiff." 80 C.J.S. *Set-Off and Counterclaim* §2 (1953) (emphasis added).

The Potawatomis sought only injunctive relief in this suit. They did not ask for a declaratory judgment or damages. The Ninth Circuit has held that "[a]lthough a counterclaim may be asserted against a sovereign by way of set off or recoupment to defeat or diminish the sovereign's recovery, no affirmative relief may be given against a sovereign in the absence of consent." *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970). The judgment of the district court gave Oklahoma affirmative relief. Oklahoma obtained a declaratory judgment for part of the relief they sought in their counterclaim. This is

contrary to the sovereign immunity doctrine and is an impermissible exercise of the trial court's jurisdiction under *Schaumburg v. United States*, 103 U.S. 667 (1881).

Because the Tribe is immune from suit, the district court lacked jurisdiction to adjudicate the counterclaim. We therefore reverse the trial court's denial of the Potawatomis' motion to dismiss Oklahoma's counterclaims and remand with directions to dismiss the counterclaims.

II. Tribe's Request for Injunction

The Potawatomis sought an injunction that "[p]ermanently enjoins defendants, their officers, agents, servants, employees, attorneys, and all those in active concern or participation with them from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against plaintiff, plaintiff's officers, agents or employees . . ." We conclude that the trial court erroneously denied the Potawatomis' request for injunction. The trial court correctly held that the phrase "Indian Country" refers to the territory over which an Indian tribe exercises its sovereign powers; it is "those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments." *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied*, U.S., 108 S. Ct. 2870 (1988). The test is whether the land has "been validly set apart for the use of the Indians as such, under the superintendence of the Government." *United States v. Pelican*, 232 U.S. 442, 449 (1914), quoted in *United States v. McGowan*, 302 U.S. 535, 539 (1938), *United States V. John*, 437 U.S. 634, 649 (1978), *cert. denied*, 441 U.S. 925 (1979). The tribal convenience store is located on land which, during all relevant periods of time, was held in trust by the federal government for the Potawatomis. Congress specifically authorized the Tribe to convey this land, located within the original Potawatomi reservation boundaries, to the United States in trust. See Act of January 2, 1975, Pub. L. No., 93-591, 88 Stat. 1922 (1975). "[L]ands held in trust by the United States for the Tribes are Indian Country within the meaning of §1151(a.)"

Cheyenne-Arapaho Tribe v. Oklahoma, 618 F.2d 665, 668 (10th Cir. 1980). It has long been the law that land purchased in a state by the federal government and held in trust for Indians is "Indian Country." See *United States v. McGowan*, 302 U.S. 535, 538-39 (1938). As set forth by the Supreme Court, section 1151 was intended to designate as Indian Country all lands set aside by whatever means for a tribe under federal protection together with trust and restricted Indian allotments. See *United States v. John*, 437 U.S. 634, 648-49 (1978).

Oklahoma argues before us that (1) the convenience store land is not a "dependent Indian community," and (2) that the tribal convenience store is not located on an "Indian allotment." Neither the trial court nor the Tribe has ever asserted that the tribal convenience store was on an Indian allotment or a dependent Indian community.

Oklahoma contends, through a statistical analyses (based on Dawes Commission reports) that no "Indian Country" exists in Oklahoma. They argue that "the Tribe has not developed a living tribal community apart from the general community of the state and have in fact been assimilated into the general community of the state." This is irrelevant. The Tribe does not dispute that its members are citizens of Oklahoma or of other states and have been "assimilated" into society. This assimilation, however, does not justify the conclusion that the Tribe has no existence apart from the state or that the Tribe has been assimilated into the state. The Tribe exists apart from its individual members. Moreover, the fact that individual members of an Indian tribe have been "assimilated" or have become citizens does not change the status of the land held by the United States in trust for the Tribe. It does not transform the land from "Indian Country" to land totally subject to state jurisdiction. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), is not contrary. In *Mescalero*, the land at issue was "located outside the boundaries of the Tribe's reservation" and was not owned by the Mescaleros but rather was "leased from the United States Forest Service for a term of 30 years." *Mescalero*, 411 U.S. at 146. *Mescalero*, therefore, is distinguishable from the case at hand; and the Court's holding that the *Mescalero* land was not "Indian Country" has no application to this case.

Because the convenience store is located in Indian Country, the Potawatomis possess sovereign powers with respect to the land and the store. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978). In *Wheeler*, the Court recognized that: "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers." *Id.* at 323. Thus, because the convenience store is located on land over which the Potawatomis retain sovereign powers, Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress. *See Bryan v. Itasca County*, 426 U.S. 373, 376-77 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 475-76 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 175-77 (1973); *United States v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986). Oklahoma cites no federal law granting such jurisdiction. Moreover, Oklahoma disclaimed jurisdiction over Indian lands upon entering the Union, did not assert jurisdiction under Public Law 280, and can point to no voluntary grant of jurisdiction by the Tribe. Oklahoma's lack of jurisdiction points out the critical distinction between this case and the cases on which Oklahoma relies. For example, Oklahoma relies on *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), for the proposition that Indian retailers are subject to state taxation—at least with respect to sales made to tribal nonmembers. In *Colville*, however, the Indian tribe had opted to come under state jurisdiction pursuant to Pub. L. No. 83-280, 67 Stat. 588 (1953) and Wash. Rev. Code §37.12.010 (1957). *See Confederated Tribes of Colville v. Washington*, 446 F. Supp. 1339, 1348-49 (E.D. Wash. 1978), *rev'd*, 447 U.S. 134 (1980). Because no such jurisdiction exists in this case, Oklahoma's reliance on *Colville* is misplaced.

We conclude that the district court improperly denied the Potawatomis' request to enjoin Oklahoma from collecting state sales tax on the Potawatomis' sales of cigarettes. Accordingly, we remand to the district court for a reinstatement of a permanent injunction on behalf of the Potawatomis.

III. Costs

This is a federal action. Unless otherwise provided, costs shall be awarded as a matter of course. Fed. R. Civ. P. 54(d) provides:

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Contrary to Oklahoma's assertion, Oklahoma can be held liable for costs. *See, e.g., State ex rel. Grigsby v. Silvers*, 180 P.2d 657 (Okl. 1947).

REVERSED and REMANDED for dismissal of Oklahoma's counterclaim and entry of an injunction as prayed for by the Potawatomis.

We also REMAND for consideration of the Potawatomis' motion for costs.

APPENDIX B

**IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Plaintiff,)
vs.) No.CIV-87-0338-W
THE OKLAHOMA TAX COMMISSION;)
CINDY RAMBO, Chairman of the Tax)
Commission; ROBERT L. WADLEY,)
Vice-Chairman of the Tax)
Commission; and DON KILPATRICK,)
Secretary of the Tax Commission,)
Defendants.)

JUDGMENT

On April 15, 1988, this Court, having reviewed the parties' Stipulation of Fact and having determined that it had jurisdiction to resolve the issues raised in the complaint of the plaintiff, The Citizen Band Potawatomi Indian Tribe of Oklahoma, and those issues raised in the counterclaim of the defendants, The Oklahoma Tax Commission, Cindy Rambo, Chairman, Robert L. Wadley, Vice-Chairman, and Don Kilpatrick, Secretary, which fell within the scope of waiver recognized in *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1984), entered Findings of Fact and Conclusions of Law. Pursuant to the same, it is hereby ORDERED and ADJUDGED

(1) that the plaintiff not only is exempt from payment of state sales taxes but also is immune from liability for the assessment issued by the defendants on March 5, 1987, for taxes due for sales of cigarettes from December 1, 1982, to September 30, 1986;

(2) that sales of cigarettes to members of The Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store a/k/a The Gallery Trading Post are exempt from application of state

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sales taxes;

(3) that sales of cigarettes to nonmembers of The Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store a/k/a The Gallery Trading Post are subject to application of state sales taxes; and

(4) that the plaintiff must aid the defendants in collection of these taxes and comply with statutory reporting and recordkeeping requirements.

In accordance with the foregoing, it is further ORDERED and ADJUDGED

(1) that the defendants are immediately and permanently enjoined from assessing any state sales taxes against and/or collecting any state sales taxes from the plaintiff;

(2) that the defendants are likewise immediately and permanently enjoined from collecting any state sales taxes on purchases by members of The Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store a/k/a The Galley Trading Post; and

(3) that the plaintiff's request for further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers of The Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store a/k/a The Galley Trading Post is DENIED.

It is ORDERED that the preliminary injunctive relief previously granted by this Court in this action

(1) as it pertains to the assessment against and/or collection from the plaintiff and its members is VACATED upon entry of this Judgment which grants immediate and permanent injunctive relief in this regard; and

(2) as it pertains to collection of state sales taxes on purchases by nonmembers of The Citizen Band Potawatomi Indian Tribe of Okla-

homa and the statutory reporting and recordkeeping requirements herein imposed on the plaintiff remains in force and effect pending the resolution of post-trial motions, if any.

It is further Ordered that each party bear its own costs.
Dated at Oklahoma City, Oklahoma, the _____ day of May, 1988.

S/_____

Lee R. West
United States District Judge
Entered in Judgment Docket on
May 6, 1988

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THE CITIZEN BAND POTAWATOMI))
INDIAN TRIBE OF OKLAHOMA,))
Plaintiff,))
vs.)) No. CIV-87-0338-W
THE OKLAHOMA TAX COMMISSION;))
CINDY RAMBO, Chairman of the Tax))
Commission; ROBERT L. WADLEY,))
Vice-Chairman of the Tax))
Commission; and DON KILPATRICK,))
Secretary of the Tax Commission,))
Defendants.))

ORDER

This matter comes before the Court on the plaintiff's request that the Court permanently enjoin the defendants from exercising or attempting to exercise jurisdiction over the plaintiff through any tax assessment proceeding and from entering the plaintiff's land to assess and/or collect state sales taxes. The defendants have counterclaimed for declaratory and injunctive relief and have sought an order declaring that the defendants can enforce state tax laws against the plaintiff and an injunction enjoining the plaintiff from selling cigarettes without collecting and remitting state sales taxes. Based upon stipulated facts and the argument and authorities submitted by the parties, the Court makes its determination.

Indian County

1. The plaintiff, The Citizen Band Potawatomi Indian Tribe of Oklahoma (the Tribe or Citizen Band), is a federally-recognized Indian tribe organized under the provisions of the Oklahoma Indian Welfare Act of June 26, 1936, and is duly recognized as an Indian tribe

by the United States Secretary of the Interior (the Secretary).

2. The defendants are the Oklahoma Tax Commission and its appointed members acting in their official capacities.

3. The Potawatomi Indians originally resided around the Great Lakes in Indiana, Illinois, Wisconsin and Michigan.

4. The "Pottawatomie Nation" was removed by the Treaty of June 5 and 17, 1846, to a thirty-square-mile reservation in Kansas.

5. Pursuant to the Treaty of November 15, 1861 (as amended by the Treaty of March 29, 1866), the reservation was divided into individual allotments. When the sale of these allotments produced poverty, the Potawatomi Indians were divided into two bands—the Prairie Band, which remained in Kansas, and the Citizen Band, which was removed to Oklahoma.

6. The Treaty of February 27, 1867, provided for a thirty-square-mile tract in Oklahoma for the Citizen Band. This area was approved as a reservation on November 9, 1870, by the Secretary and it included most of Pottawatomie County, part of eastern Cleveland County, part of southeastern Oklahoma County and a few acres in southwestern Lincoln County.

7. On May 23, 1872, the Citizen Band agreed to have a portion of its reservation allotted to tribal members. The allotments began in 1875 and continued for fifteen years until the passage of the General Allotment Act of 1887 (The Dawes Act). In 1891, the Citizen Band reservation was divided into allotments; unallotted land either was considered "surplus" and sold to non-Indians or was retained by the federal government.

8. On September 13, 1960, the federal government after concluding certain of this retained land was also surplus, conveyed to the Citizen Band 57.99 acres in Pottawatomie County. The legislation authorizing this conveyance stated that the property would be subject to no exemption from taxation or restriction on use, management or disposition because of Indian ownership.

9. On August 11, 1964, the federal government conveyed seven additional tracts, 255.196 acres, to the Citizen Band in Pottawatomie County. The legislation conveying these seven tracts as it pertained to tracts numbered six and seven likewise stated that these tracts were not exempt from taxation or restriction on use, management or disposition because of Indian ownership.

10. On September 16, 1971, the Citizen Band by resolution asked the federal government to accept all conveyed land in trust. This resolution expressly noted that the lands to be conveyed to the federal government were subject to no restrictions because of Indian ownership and requested that the lands should be redesignated restricted lands.

11. On February 18, 1974, the Mayor and the Board of Commissioners of the City of Shawnee passed a resolution wherein they endorsed the Tribe's request for trust status of the land.

12. On January 2, 1975, Congress authorized the Citizen Band to convey seven tracts, 279.956 (the 57.99 acres included in the 1960 conveyance and the first six tracts included in the 1964 conveyance) to the United States in trust for the benefit and use of the Tribe.

13. On May 27, 1976, this was accomplished.

14. The Tribe owns and operates a convenience store called the "Potawatomi Tribal Store a/k/a The Gallery Trading Post." The store was constructed by the Citizen Band with federal funds secured from a Community Development Block Grant program sponsored by the United States Department of Housing and Urban Development.

15. The land upon which this tribal store is located was included in the unallotted land that was retained by the federal government in 1891. It was held by the federal government until 1964 when it was included in the 255.196 acres conveyed to the Tribe. It was then returned to the federal government in trust for the benefit and use of the Tribe in 1976.

"The touchstone for allocating authority among the various governments has been the concept of "Indian Country," a legal term delineating the territorial boundaries of federal, state and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian Country have been matters of federal and tribal concern. Outside Indian County, state jurisdiction has obtained."

Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 973 (10th Cir. 1987) (quoting *Ahboah v. Housing Authority of the Kiowa Tribe*, 660 P.2d 625, 627 (Okla. 1983)). While the defendants have argued that the status of the land upon which the tribal store is located is immaterial, the Court has nevertheless determined to resolve this issue and in so doing has referred to the United States Supreme Court's decision in *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 444 (1975).

In *DeCoteau*, the Supreme Court addressed the very legislative enactments which ratified the sum certain, cession agreements which pertain to this case and found that it was clear that the reservation had been diminished by conveyance of unallotted lands to the federal government and that these unallotted lands had been stripped of reservation status. *Id.* at 446. Such conclusion is however not dispositive of the issue in the instant case. Under the broad interpretation given to title 18, section 1151 of the United States Code, subsequent events have, in this Court's opinion, restored a portion of these original unallotted and conveyed lands to "reservation" status and thus to "Indian country" status. This portion includes the land upon which the tribal store is located.

Section 1151 defines "Indian country" in part as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government ...," 18 U.S.C. Section 1151(a), and although enacted for purposes of determining federal criminal jurisdiction, the statute is equally applicable in civil cases. *E.g., California v. Cabazon Band of Mission Indians*, 55 U.S.L.W. 4225, 4226 n.5 (February 25, 1987). As the United States Court of Appeals for the Tenth Circuit

noted in *Indian Country*, the term "Indian reservation" has been used in various ways and "[a] formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status." 829 F.2d at 973. The circuit court noted that

"for purposes of defining Indian country, the term simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments."

The defendants have contended that the circumstances surrounding the reacquisition of the land by the Tribe and the eventual conveyance of the land in trust to the federal government for the benefit and use of the Tribe show no intent on the part of the Tribe or the federal government that the land be a "reservation." The Court finds the language contained in Senate Report No. 93-877 which accompanied the legislation conveying the land to the federal government in 1974 belies such argument. The Senate Report reads in part that

"[t]he present fee ownership of the land presents a major problem to the band. The Economic Development Act provides that tribally owned lands which are held in trust may receive EDA designation, thereby enabling the tribes to qualify if otherwise eligible for loans and grants from the agency. If the United States were to accept the band's conveyance and hold these tracts in trust, the band could apply for EDA designation, which if conferred, would enable it to develop commercial and industrial sites. The end result of such development would be the alleviation of the band's and the area's unemployment problems."

There is no question that the original reservation was Indian country because it was validly set apart for use by the Tribe. While the Court is not persuaded by the Tribe's argument that the land was held "in trust" from 1891 to 1964 based upon the unequivocal language of the General Allotment of 1887, it is clear that the land is

now held in trust for the benefit and use of the Tribe. The protective attitude of the federal government which is embodied and reflected in case law interpretation of the definition of "Indian country" is supported by this intent to redesignate the status of the land so that the Tribe would qualify for federal assistance. Such acceptance of the land by the federal government and such redesignation at the insistence of Tribe indicate a renewed existence of federal superintendence.

TAXATION

The intrusion of state taxing power into Indian country is one of the most frequently litigated issues between Indian tribes and states, in part no doubt because of the serious financial importance this power has for both entities. Based upon extant authority and to the extent that this lawsuit involves *both* the issue of assessment and the issue of collection, the Court sets forth the following findings and conclusions.

1. The tribal store sells packages of cigarettes to all persons of legal age.
2. No records are kept which distinguish between sales to tribal members, other Indians and non-Indians.
3. Under Oklahoma law, the defendants enforce state taxing laws including a cigarette tax which requires those selling cigarettes in the state of Oklahoma to be licensed and to purchase and affix state tax stamps before selling cigarettes.
4. The Tribe has never purchased a license to sell cigarettes from the state of Oklahoma.
5. The tribe does not and has never collected state sales tax on packages of cigarettes.
6. The tribe does impose a tribal tax on the cigarettes sold and all packages of cigarettes sold bear a tribal tax stamp.

7. The Tribe's tobacco ordinance has been approved by the Department of Interior-Bureau of Indian Affairs.

8. The money generated by the sale of cigarettes goes into the tribal general fund for the use and benefit of the Tribe.

9. As of September 30, 1985, gross annual sales for the tribal store totalled \$1,764,704.00 and the Tribe had gross annual operating revenues from all sources of \$2,158,906.00.

10. On March 5, 1987, the Tribe received a proposed assessment in the amount of \$2,671,470.70 for state cigarette taxes allegedly due for cigarette sales by the Tribe at the tribal store from December 1, 1982, to September 30, 1986.

11. The Oklahoma sales tax is expressly imposed on the ultimate consumer. 68 O.S. § 1361. Thus, the legal incidence of such tax falls upon the purchaser. *E.g., Indian Country*, 829 F.2d at 984.

Oklahoma has disclaimed jurisdiction over Indian land. *See. Indian Country*, 829 F.2d at 976-81. The effect of this disclaimer of jurisdiction "is to retain exclusive federal jurisdiction until Indian title in such lands is extinguished." *Id.* at 980 (quoting S.Rep. No. 699, 83d Cong., 1st Sess., reprinted in [1953] U.S. Code Cong. & Ad. News 2409, 2412). Despite such disclaimer, the United States Supreme Court has ruled that even in the absence of express congressional consent, a state under certain circumstances" may validly assert authority over the activities of nonmembers on a reservation, and ... in exceptional circumstances...may assert jurisdiction over the on-reservation activities of tribal members." *Cabazon Band*, 55 U.S.L.W. at 4228 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)). While notions of Indian sovereignty have been adjusted in the area of state taxation to accommodate state interests in regulating the affairs of nontribal members (subject, as herein addressed, to two important limitations), a *per se* rule has nevertheless been adopted with regard to taxation of on-reservation activities of tribal members. 55 U.S.L.W. at 4228 n.17.

In this regard, the Tribe itself not only is exempt from payment of state sales tax (such exemption is recognized and acknowledged by the defendants in pleadings to this Court) but also is immune from liability for the instant assessment since payment of the tax falls not on the ultimate consumer but in this situation on the Tribe. Likewise, the Court finds that purchasers of cigarettes at the tribal store who are Citizen Band members are exempt from payment of state sales tax. *E.G., Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-81 (1976).

As noted, the state's ability to exercise concurrent jurisdiction over nontribal members' on-reservation activities and power to levy taxes on on-reservation sales of nontribal purchasers is subject to two separate and equally vital restrictions. First, the exercise of state authority may be preempted by federal law and second, such authority may unlawfully infringe on the right of reservation Indians to make their own laws and be governed by them. Either barrier, standing alone, can be a sufficient basis for holding state law inapplicable to on-reservation activities. *E.g. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-143 (1980).

Preemption demands "a particularized inquiry into the nature of the state, federal, and tribal interests at stake," *Indian Country*, 829 F.2d at 985 (quoting *Bracker*, 448 U.S. at 145), and "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interest at stake is insufficient to justify assertion of state authority." 829 F.2d at 985 (quoting *Mescalero Apache Tribe*, 462 U.S. at 334).

The state has a strong interest in increasing revenue and in preventing evasion of valid tax laws and this interest is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980). Tribal interests are likewise strongest "when the revenues are derived from value generated on the reservation by activities involving the Tribe and when the taxpayer is the recipient of tribal services." *Id.* at 156-57.

In the instant case the value marketed by the tribal store to nontribal members is not generated on the reservation by activities in which the Tribe has a significant interest. *Id.* at 155. What the tribal store offers these purchasers is solely an exemption from state taxation. *Id.*; e.g., *Mescalero Apache Tribe*, 462 U.S. at 341 & n.26 (distinction between on reservation sales to nonmembers of goods not manufactured by Tribe or its members).

Furthermore the fact that the Tribe itself has imposed a cigarette tax does not demand preemption of a state law as to persons who would conduct business elsewhere. 447 U.S. at 155. The Court realizes that application of a state tax to sales by nontribal purchasers blunts the attractiveness of such sales and that an additional tribal tax creates a potential competitive disadvantage. However, in this instance it is the nontribal consumer who saves the tax and who reaps the benefit of any tax exemption, *Moe*, 425 U.S. at 481-82, and such situation does not require preemption of a nondiscriminatory state tax.

Likewise the fact that the federal government encourages self-sufficiency and economic development, has approved the Citizen Band's tobacco ordinance or has provided funds to construct the tribal store neither immunizes nontribal purchasers nor insulates sales by nontribal purchasers from application of the state tax.

The doctrine of infringement bears a close relation to the doctrine of preemption because interference with tribal self-government is interference with the federal policies that promote it and it too triggers a balancing of tribal, federal and state interests. *Colville*, 447 U.S. at 156. Recognizing that both the state and the Tribe have competing interests in volume sales of cigarettes, the Court must weigh the state's interest in applying its cigarette tax to on-reservation sales to nontribal members against the impact this nondiscriminatory tax has on the Tribe's ability to govern itself effectively. Because the Citizen Band is not developing or marketing a tribal resource but is only importing a product for immediate resale to *inter alia* nontribal members, the Court finds application of this tax does not impermissibly infringe on the Citizen Band's right to self-government. Reduction of tribal revenue does not invalidate a state tax. E.g., *id.* at 154-59.

Thus, the Court finds while the instant assessment against the Tribe for payment of cigarette sales tax unremitting from 1982 to 1986 is improper, prospective collection by the Tribe on on-reservation sales to nontribal members is permitted. The state's requirement that the Tribe collect a tax validly imposed on nontribal members is a "minimal burden" *Moe*, 425 U.S. at 483, which does not frustrate tribal self-government. *Id.* The Court finds further that the Tribe must affirmatively aid the state in its collection of this tax and comply with statutorily recordkeeping requirements. *Colville*, 447 U.S. at 159.

In this regard, the defendants have contended that the Tribe has an adequate state remedy to resolve the issues herein. Without deciding whether submission to the state's administrative proceedings would result in financial ruin to the Tribe and without resolving whether ability to pay excuses exhaustion of administrative avenues, the Court finds that these issues are properly before it for determination.

COUNTERCLAIM

Tribal sovereign immunity prohibits suit against Indian tribes without congressional authority. Thus, before this Court can acquire jurisdiction over the Citizen Band as to the defendants' counterclaim, it must appear affirmatively that "there has been a congressional or tribal waiver of immunity." *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982); e.g., *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). It has also been recognized that when a sovereign sues "it waives immunity as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject matter of the [sovereign's] suit, and to the extent of defeating the [sovereign's] claim but not to the extent of a judgment against the [sovereign] which is affirmative in the sense of involving relief different in kind or nature to that sought by the [sovereign] or in the sense of exceeding the amount of the [sovereign's] claims...." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) (quoting *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1961)). The Tenth Circuit has held that this doctrine

applies equally to Indian tribes. 687 F.2d 1344.

The Tribe did not waive its traditional immunity simply because it initiated this action. Thus, the Court must examine the allegations and the relief sought in the defendants' counterclaim in light of these limitations as to subject matter and issues reasonably incident to the primary action. In so doing, the Court finds that to the extent that both the Tribe and the defendants question jurisdiction of the state and its taxing power as to purchasers of cigarettes at the tribal store, the counterclaim is permissible.

CONCLUSION

Due to the number of issues and arguments advanced by the parties, the Court hereby DIRECTS the parties to confer within fifteen (15) days and to advise the Court thereafter if any issues remain to be resolved. If the parties agree that entry of final judgment is appropriate, they are to confer within this same period of time and to submit a final judgment immediately thereafter in accordance with the Court's findings and conclusions for the Court's approval and signature. This Court's Order which granted the Tribe's request for preliminary injunctive relief and which is now in force and effect will be vacated upon entry of final judgment.

It is so ORDERED this 15th day of April, 1988.

S/Lee R. West
LEE R. WEST
UNITED STATES DISTRICT COURT

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APPENDIX D

Letter from Business Tax Division of the Oklahoma Tax Commission

March 4, 1987

To: Citizen Band Potawatomi Indian Tribe of Oklahoma
DBA: Gallery Trading Post
Route 5, Box 151
Shawnee, OK 74801

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Re: Proposed Assessment of Penalty and Interest in the Amount of
\$2,691,470.70 for Sale and Distribution of Unstamped Cigarettes

Gentlemen:

From an examination and audit of reports, it appears that during the period from December 1, 1982 to September 30, 1986, you sold and/or distributed for consumption 6,134,380 packs of twenty cigarettes each, and 18,780 packs of twenty-five cigarettes each, without stamps affixed thereto as required by law.

The amount of tax due upon the sale or distribution of said number of cigarettes is \$1,108,413.90.

Pursuant to the provisions of 68 O.S. 1981, §305(c) the Oklahoma Tax Commission hereby proposes the assessment against you of \$2,216,827.80, the sum being equal to twice the amount of the tax due, plus interest thereon to the date of this letter, in the amount of \$363,801.51 and penalty in the amount of \$110,841.30; for a total proposed assessment of \$2,691,470.70.

If you would wish to protest this proposed assessment, you may file a verified written protest, in triplicate, with the Business Tax Division of the Oklahoma Tax Commission within thirty (30) days after the

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date of mailing this letter, as provided in 68 O.S. 1981, §221. If you fail to file a written protest within the thirty day period, this assessment will, without further action by the Commission, become final and absolute at the expiration of thirty days from the date of mailing shown above. Such final assessment will accrue interest at the rate of eighteen percent (18%) per annum until paid, and further proceedings by way of tax warrant or court action may be had to enforce the state's lien.

Very truly yours,
OKLAHOMA TAX COMMISSION

s/Ray A. Freeman
Ray A. Freeman
Operation Support Section

APPENDIX E

TITLE 28 UNITED STATES CODE §1362

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

APPENDIX F

TITLE 28 UNITED STATES CODE §1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
- (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.